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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-~~76-919~~

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	8
I. This Case Presents an Unresolved Issue of Great Importance to the 180 American Indian Tribes Which Have Accepted the Indian Reorganization Act.	8
II. The Political and Business Development Provisions of the Indian Reorganization Act are Separate and Distinct.	12
III. The Montana Construction of the Indian Reorganization Act is Fundamentally Inconsistent with Concepts of Tribal Sovereign Immunity Long Recognized by This Court	16
CONCLUSION	19
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:

Bryan v. Itasca County, ... U.S. ...., 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976) 12, 16
Cherokee Nation v. State of Oklahoma, 461 F.2d 674 (10th Cir. 1972) 10
Edelman v. Jordan, 415 U.S. 651 (1974) 9, 18
Fisher v. District Court, 424 U.S. 382 (1976) .. 8, 12, 14, 20
Fitzpatrick v. Bitzer, ... U.S. ...., 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976) 9

Page

Great Northern Life Insurance Co v. Read, 322 U.S. 47 (1943) 9, 17, 18
Haile v. Saunooke, 246 F.2d 293 (4th Cir. 1957), *cert. denied*, 355 U.S. 893 (1957) .....
Hamilton v. Nakai, 453 F.2d 152 (9th Cir. 1972) 10
Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939) 18
Kennerly v. District Court, 400 U.S. 423 (1971) 20
Land v. Dollar, 330 U.S. 731 (1947) 9, 17
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) 9, 17
Madruga v. Superior Court, 346 U.S. 556, (1954) 8
Martinez v. Southern Ute Tribe, 374 P.2d 691 (Colo. 1962) 11, 15
Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966), *cert. denied* 385 U.S. 918 (1967) 15
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 13
Monaco v. Mississippi, 292 U.S. 313 (1934) 9, 18
Morgan v. Colorado River Indian Tribe, 443 P.2d 421 (Ariz. 1968) 10
Namekagon Development Co. v. Bois Forte Reservation Housing Authority, 395 F. Supp. 23 (D. Minn. 1974), *aff'd* 517 F.2d 508 (8th Cir. 1975) 11, 14
New York v. United States, 326 U.S. 572 (1946).... 8, 9
Ohio v. Helvering, 292 U.S. 360 (1934) 9
Parden v. Terminal Ry. of the Alabama State Docks Dept., 337 U.S. 184 (1964) 9
Turner v. United States, 248 U.S. 354 (1919) 17
Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) .. 10
United States v. Mazurie, 419 U.S. 544 (1975) 14, 19
United States v. Shaw, 309 U.S. 495 (1940) 17
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 9, 16, 17, 18
Williams v. Lee, 358 U.S. 217 (1959) 14

Page

STATUTES AND CODES:

11 Stat. 657, Treaty of October 17, 1855 5
18 Stat. 28, Act of April 15, 1874 5
25 Stat. 113, Act of May 1, 1888 5
48 Stat. 984, 25 U.S.C. § 461, the Indian Reorganization Act 2, 4, 13
82 Stat. 77, 25 U.S.C. § 1302, the Indian Civil Rights Act 19
86 Stat. 1176, 28 U.S.C. § 2409a; Act of October 25, 1972 18
88 Stat. 77, 25 U.S.C. § 1451, *et seq.*, the Indian Financing Act of 1974 .....12, 15
88 Stat. 2203, 25 U.S.C. § 450, *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975 .....12, 15, 16
5 U.S.C. § 702 20
25 U.S.C. § 450n 15, 16
25 U.S.C. §§ 476-477 .....2, 3, 6, 8, 13
28 U.S.C. § 1257(3) 2, 8
Pub. L. No. 94-574 (October 21, 1976) 20

INTERIOR OPINIONS:

Solicitor's Opinion M-36119, 61 I.D. 8 (Feb. 14, 1952) .. 10
Solicitor's Opinion M-36515, 65 I.D. 483 (Nov. 20, 1958) 10
Solicitor's Opinion, 55 I.D. 14, (1934) 14
Solicitor's Opinion, 69 I.D. 483 (1958) 12, 13

LEGISLATIVE HISTORY:

S.Rep. 3645, 73d Cong., 2d Sess. (1934) 10

Page

OTHER AUTHORITIES:

Fort Belknap Indian Community Corporate Charter.. 4, 5

Comment, Tribal Self-Government in the Indian Reorganization Act of 1934, 70 Mich.L.Rev. 955, (1972) 11

1972 U.S. Code Congressional & Administrative News 4547 18

Executive Order of July 5, 1873, I Kapp. 855, 856 (2d ed. 1904) 5

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v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

The Fort Belknap Indian Community of the Fort Belknap Indian Reservation in Montana petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Montana.

OPINIONS BELOW

The judgment of the Montana Supreme Court (App. p. 1a) is reported at 554 P.2d 1115 (Mont. 1976). The state district court's order (App. p. 2a) is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Montana was entered on October 7, 1976. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did Congress in the Indian Reorganization Act, the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*, waive the immunity from suit of the Fort Belknap Indian Community in a tort action involving the conduct of a tribal police officer?

STATUTES INVOLVED

Indian Reorganization Act

Section 16 of the Indian Reorganization Act, codified at 25 U.S.C. § 476 provides:

> Organization of Indian tribes; constitution and by laws; special election
>
> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Section 17 of the Indian Reorganization Act, codified at 25 U.S.C. § 477, provides:

> The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

FORT BELKNAP INDIAN COMMUNITY CORPORATE CHARTER

Whereas, the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana constitutes a recognized Indian Community organized under a constitution and by-laws ratified by the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation on October 19, 1935, and approved by the Secretary of the Interior on December 13, 1935, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult Indians on the Fort Belknap Indian Reservation who are members of the Gros Ventre and Assiniboine Tribes have petitioned that a charter of incorporation be granted to such community, subject to ratification by vote of said Indians living on said reservation;

Now, therefore, I, Charles West, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934 (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Fort Belknap Indian Community of the Fort Belknap Reservation to be effective from and after such time as it may be ratified by a majority vote of the adult Indians living on the reservation, at an election in which at least thirty percent of the eligible voters vote.

1. *Corporate Existence.* In order to further the economic development of the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana by conferring upon the said community certain corporate rights, powers, privileges and immunities; to secure for the members of the Community an assured economic Independence; and to provide for the proper exercise by the Community of various functions heretofore performed by the Department of the Interior, the aforesaid community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Fort Belknap Indian Community"...

5. *Corporate Powers.* The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:...

(i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.

(j) To exercise such further incidental powers not inconsistent with law, as may be necessary to the conduct of corporate business.*

STATEMENT OF THE CASE

Petitioner, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation is a federally recognized Indian Community. The Community is made up of the Gros Ventre and Assiniboine Tribes and its occupies a reservation in the State of Montana. By the Treaty of October 17, 1855, 11 Stat. 657, the Act of April 15, 1874, 18 Stat. 28, the Act of May 1, 1888, 25 Stat. 113, and the Executive Order of July 5, 1873, the United States set aside an Indian reservation for the use and occupancy of the Fort Belknap Indian

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* The Corporate Charter is set out in its entirety in the Appendix. (App. pp. 5a-13a).

Community. The Fort Belknap Indian Community has adopted a constitution and by-laws in accordance with Section 16 of the Indian Reorganization Act (the "IRA") authorizing it to exercise official governmental powers as a federally recognized Indian tribe. The constitution and by-laws were approved by the Secretary of the Interior on December 13, 1935. In addition, the Fort Belknap Indian Community has adopted pursuant to Section 17 of the IRA a corporate charter as a federal Indian corporation authorizing it to transact corporate business to further the economic development of the Fort Belknap Reservation. The corporate charter was issued by the Secretary of the Interior on July 29, 1937. Respondents are the District Court of the Twelfth Judicial District for the State of Montana in and for the County of Blaine and the Honorable Bernard W. Thomas, District Court Judge.

On September 18, 1975, one James W. Gardipee filed suit in the District Court of the Twelfth Judicial District seeking $75,000 for general damages, $5,000 for special damages and $100,000 for punitive damages against the Fort Belknap Indian Community for an alleged intentional and malicious tort committed by Leon Martinez, a police officer employed by the Fort Belknap Indian Community. Martinez was not named as a defendant. On November 20, 1975, Gardipee filed an amended complaint in the same court seeking $75,000 for general damages, and $5,000 for special damages against the Fort Belknap Indian Community for wanton and malicious assault by Martinez or, in the alternative, for negligent conduct by Martinez.[1] In

[1] A copy of the Amended Complaint is reproduced in the Appendix to this Petition (App. pp. 3a-5a).

the amended complaint, Gardipee alleged that he was arrested by Leon Martinez who was acting in the performance of his duties as Chief of Police of the Fort Belknap Indian Community for driving without a valid Montana operator's license on the Fort Belknap Reservation. Because Gardipee did not post bond at the time of his arrest, he was transported by the police officer off the reservation to the Blaine County Jail in Chinook, Montana for incarceration pending the posting of a bond, pursuant to a working agreement between the Fort Belknap Indian Community and Blaine County. The amended complaint further alleged that during the trip Gardipee requested and received permission to leave the automobile and the custody of Leon Martinez, and that subsequently, a dispute arose with the result that Martinez shot Gardipee and injured his leg.

On December 11, 1975, the Fort Belknap Indian Community moved to dismiss the amended complaint. On February 23, 1976, the District Court of the Twelfth Judicial District by Judge A. W. Thomas denied the motion to dismiss finding both subject matter jurisdiction over the alleged tort because it occurred off the reservation, and personal jurisdiction over the Fort Belknap Indian Community because of the inclusion in the corporate charter of the community of language authorizing the Indian corporation to sue and to be sued.

On May 11, 1976, the Fort Belknap Indian Community filed a Petition for Writ of Supervisory Control or Other Appropriate Writ in the Montana Supreme Court seeking a reversal of the February 23, 1976 jurisdictional order of the state district court. On May 18, 1976, the Montana Supreme Court denied

the petition without prejudice and requested clarification as to whether the alleged tortious conduct of the tribal police officer occurred on or off the Fort Belknap Indian Reservation. On July 8, 1976, the Fort Belknap Indian Community filed a second Petition for Writ of Supervisory Control or Other Appropriate Writ in the Montana Supreme Court once again seeking to have a reversal of the district court's jurisdictional order. On October 7, 1976, the Supreme Court of the State of Montana entered a final order denying the petition.[2]

REASONS FOR GRANTING THE WRIT

I

This Case Presents an Unresolved Issue of Great Importance to the 180 American Indian Tribes Which Have Accepted the Indian Reorganization Act.

The Fort Belknap Indian Community seeks to have this Court resolve the question of whether Congress, in enacting 25 U.S.C. § 477 authorizing Indian tribes to incorporate as federal business corporations, effected a waiver of sovereign immunity over the official governmental actions of America's Indian tribes. The issue is of great importance to American Indians. The Montana decision, which finds a broad waiver of sovereign immunity extending beyond tribal business transactions to official governmental actions, is fundamentally at odds with this Court's decisions on waivers of sovereign immunity. *Cf. New York* v. *United States,*

[2] The October 7, 1976 Order of the Montana Supreme Court denying the Petition for Writ of Supervisory Control or Other Appropriate Writ filed by the Fort Belknap Indian Community is a final judgment within the jurisdiction of 28 U.S.C. § 1257(3). See Fisher v. District Court, 424 U.S. 382, 385, n. 7 (1976); Madruga v. Superior Court, 346 U.S. 556, 557 (1954).

326 U.S. 572, 579 (1946); *Ohio* v. *Helvering,* 292 U.S. 360, 369 (1934).

This Court has held that sovereign immunity protects the treasures and official authorities of governments from judicial intervention except in narrowly defined circumstances. In the case of the United States, sovereign immunity is derived by implication, *Monaco* v. *Mississippi,* 292 U.S. 313 (1934). State sovereign immunity is secured by the Eleventh Amendment, *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Similarly, the sovereign immunity of federal Indian tribes arises because of their unique status as dependent sovereign nations, *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940).

The nature and extent of sovereign immunity has been clarified by this Court in a number of significant decisions. Each holding preserves intact the right of governments to be immune from those suits whose judgments would result in either a raid on the government's treasury or interference with the administration of the government's official operations. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947). Each decision confirms that a waiver of sovereign immunity requires explicit sovereign action. *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 53-55 (1943); *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 186 (1964); *Fitzpatrick* v *Bitzer,* — U.S. —, 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976). These important principles are swept aside by the Montana decision.

The Montana courts read the Fort Belknap Indian Comunity's corporate charter provision "to sue and to be sued" to effect a waiver of sovereign immunity

for official tribal governmental actions rather than simply tribal business transactions. The Montana holding ignores Congress' plan in the Indian Reorganization Act to create both tribal governmental entities with their sovereign immunity intact, and separate and distinct corporate business entities with the authority to waive their sovereign immunity for specifically identified business transactions. *See, e.g.,* S. Rep. 3645, 73d Cong., 2d Sess. (1934); Solicitor's Opinion M-36515, 65 I.D. 483 (Nov. 20, 1958); Solicitor's Opinion M-36119, 61 I.D. 8 (Feb. 14, 1952). Similarly, the lower courts' holding frustrates the scheme of the Fort Belknap Indian Community, a sovereign Indian government, to maintain separate tribal governmental and business entities through the adoption of a constitution (without the language "to sue and to be sued") and the acceptance of a separate corporate charter (with the language "to sue and to be sued").

Moreover, the Montana decision for which review is sought contradicts the teachings of all prior decisions which have considered the nature and scope of tribal sovereign immunity. *See, e.g., Haile* v. *Saunooke,* 246 F.2d 293 (4th Cir. 1957), *cert. denied,* 355 U.S. 893 (1957); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe,* 370 F.2d 529 (8th Cir. 1967); *Cherokee Nation* v. *State of Oklahoma,* 461 F.2d 674 (10th Cir. 1972); *Hamilton* v. *Nakai,* 453 F.2d 152 (9th Cir. 1972); *Morgan* v. *Colorado River Indian Tribe,* 443 P.2d 421 (Ariz. 1968). In addition, the Montana decision conflicts with prior decisions holding that the waiver of sovereign immunity accomplished by the language "to sue and to be sued" contained in the corporate charters of Indian tribes organized under the IRA is restricted to specifically

identified business transactions where the tribe has expressly waived its sovereign immunity. *Maryland Casualty Co.* v. *Citizens National Bank of West Hollywood,* 361 F.2d 517 (5th Cir. 1966), *cert. denied,* 385 U.S. 918 (1967); *Martinez* v. *Southern Ute Tribe,* 374 P.2d 691 (Colo. 1962). *Cf., Namekagon Dev. Co.* v. *Bois Forte Res. House Au.,* 395 F. Supp. 23 (D. Minn. 1974), *aff'd,* 517 F.2d 508 (8th Cir. 1975).

Because the holding of the Montana courts is at odds with basic principles of sovereign immunity, and because it presents the first judicial determination that the waiver of sovereign immunity provided for in the corporate charters of Indian tribes organized under the IRA affects not only specifically identified corporate business transactions, but also official tribal governmental actions, the 131 tribes with corporate charters similar to that of the Fort Belknap Indian Community[3] require a clarification from this Court as to the precise nature and scope of the waiver of sovereign immunity contained in their federally approved charters.

In the absence of review by this Court, the Montana decision poses a direct threat to the sovereign authority of these tribes. Since the Montana suit seeks significant monetary damages against the Fort Belknap Community for official actions of a tribal police officer, it has caused a serious chilling effect on the exercise of Fort Belknap tribal self-government. The Fort Belknap Indian Community must now take steps to limit its liability in order to protect scarce tribal funds. The level of tribal services may have to be sig-

[3] *See,* Comment, Tribal Self-Government in the Indian Reorganization Act of 1934, 70 Mich.L.Rev. 955, 972 (1972).

nificantly reduced. Other tribes will soon be forced to take similar steps. Unless this Court reviews the Montana decision tribal self-government, strengthened by recent congressional enactments [4] and important rulings of this Court, [5] will be seriously undermined.

II

The Political and Business Development Provisions of the Indian Reorganization Act Are Separate and Distinct.

The critical mistake of the Montana decision lies in its assumption that Congress intended the IRA to waive the immunity from suit of tribes for their official governmental actions. To the contrary, a review of the Act and its purposes reveals that Congress intended the IRA to strengthen the authority of tribal governments on one hand, while at the same time to permit tribal business corporations to enter into reservation development transactions. This dual purpose was carefully explained by the Solicitor of the Department of the Interior:

> The purposes of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device,

[4] *E.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.* Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*.

[5] Fisher v. District Court 424 U.S. 382 (1976); Bryan v. Itasca County, — U.S. —, 48 L.Ed.2d 710, 96 S.Ct. 2102 (1976).

> which charter cannot be revoked or surrendered except by act of Congress. *This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.* (Emphasis supplied.)

69 I.D. 483, 484 (1958). That Congress intended to create separate governmental and corporate business bodies for tribes accepting the IRA has also been recognized by this Court. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973).

In Section 17 of the IRA, Congress provided the tribes with federal charters which granted them the power to manage, operate and dispose of property, and in addition "such further powers as may be incidental to the conduct of corporate business not inconsistent with law." 25 U.S.C. § 477. Based on this conferral of "further incidental powers," the Secretary of the Interior issued over one hundred corporate charters each of which contains a separate provision allowing the corporations to sue and to be sued. The Fort Belknap Indian Community's federal corporate charter confers upon the Community certain corporate rights, powers, privileges, and immunities designed to further the economic development of the Fort Belknap Indian Reservation. The Community has utilized its corporate charter to establish numerous reservation businesses, including a 2,800 acre wheat farm.

In enacting Section 16 of the IRA, Congress confirmed the inherent sovereign powers of the Indian

tribes.[6] These powers of self-government have been often upheld by this Court. *Williams* v. *Lee*, 358 U.S. 217 (1959); *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Fisher* v. *District Court*, 424 U.S. 382 (1976). In accordance with its powers of self-government, the Fort Belknap Indian Community has adopted a constitution and by-laws authorizing it to govern the territory of the Fort Belknap Indian Reservation. Included in its constitution are provisions authorizing the Community to undertake a program of law enforcement on the reservation. Pursuant to that authority the Fort Belknap Indian Community has established a law and order code,[7] and has employed several law enforcement officials, including Leon Martinez, the police officer whose actions formed the basis of Gardipee's complaint in this case.

The courts which have construed the waiver of sovereign immunity contained in the sue and to be sued provisions in tribal corporate charters issued under the IRA have honored Congress' scheme. They have held that any waiver must be strictly limited to corporate business transactions where chattels and income have been specifically pledged. *Namekagon Dev. Co.* v. *Bois Forte Res. House Au.*, 395 F. Supp. 23 (D.

[6] The Solicitor of the Department of the Interior in a contemporaneous opinion issued a comprehensive analysis of the tribal governmental powers of IRA tribes. The tribal powers were characterized as inherent powers of a limited sovereignty which have never been extinguished. Included in the powers enumerated in the Solicitor's Opinion is the right of a tribe to maintain law and order on its reservation. 55 I.D. 14, 48-64 (1934).

[7] The Fort Belknap Law and Order Code established tribal courts, rules for civil and criminal procedure, a code defining criminal offenses, juvenile offenses and domestic relations; and adopted the Montana traffic laws for reservation highways.

Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975); *Maryland Casuality Co.* v. *Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir. 1966), *cert. denied* 385 U.S. 918 (1967). *See also, Martinez* v. *Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962). In each of these cases the court limited the waiver of sovereign immunity to corporate business assets, and in so doing acknowledged that the IRA preserved the sovereign immunity of the tribal governments.

The congressional scheme found in the IRA as well as the official governmental and business policies of over one hundred tribes with IRA constitutions and charters are threatened by the Montana decision. Furthermore, current federal policies designed to strengthen tribal self-government such as the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 451, *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450, *et seq.*, are frustrated by the Montana decision, particularly the express language in the Indian Self-Determination and Education Assistance Act which provides that nothing in its provisions shall be construed as impairing the sovereign immunity from suit enjoyed by the tribes. 25 U.S.C. § 450n.[8] In addition, the Montana

[8] The primary purpose of the Indian Self-Determination and Education Assistance Act of 1975 is to have tribes take over many governmental services historically provided by the Bureau of Indian Affairs. Thus, in 1976, tribes began sharing with the Bureau of Indian Affairs over $287,306,000 in congressionally appropriated funds for reservation social services, law enforcement, housing, management of tribal governments, school operations, and road maintenance. Similarly, in 1976, the Fort Belknap Indian Community shared with the Bureau of Indian Affairs $652,914 in congressionally appropriated funds allocated for reservation services. [Figures obtained from the Office of Budget, Bureau of Indian Affairs, Washington, D.C. and Billings, Montana.] If liti-

decision undermines a recent decision of this Court which held *inter alia* that Congress did not consent to have tribes be subject to state court jurisdiction when it enacted Public Law 280, 28 U.S.C. § 1360, to allow reservation Indians to utilize state courts to resolve their private disputes. *Bryan* v. *Itasca County,* — U.S. —, 48 L.Ed.2d 710, 721, 96 S.Ct. 2102 (1976). This Court in *Bryan* v. *Itasca County, supra,* acknowledged the need to protect tribal sovereignty and reservation resources from intrusions not expressly authorized by Congress, to keep tribes from becoming little more than "private voluntary organizations." 48 L.Ed.2d at 721. The Montana decision thus ignores both recent acts of Congress and recent decisions of this Court. It opens the door for unlimited erosion of tribal treasuries. It must, therefore, be reviewed by this Court.

III

The Montana Construction of the Indian Reorganization Act Is Fundamentally Inconsistent with Concepts of Tribal Sovereign Immunity Long Recognized by This Court.

The decision of the Montana courts is fundamentally in conflict with holdings of this Court which strictly construe any waiver of sovereign immunity of an American Indian tribe. In *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 509 (1940), this Court prohibited a cross-claim against a

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gants can obtain money judgments against tribes for events arising out of official governmental activities, federal funds obtained by the tribes by contract under the Indian Self-Determination and Education Assistance Act as well as tribal funds derived from taxes and reservation development, may be seized to satisfy the judgments, and Congress' express directive in 25 U.S.C. § 450n will be violated.

tribe in a suit by the United States on behalf of the Choctaw and Chickasaw Nations:

> No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the United States. The public policy which exempted the defendant as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. *These Indian Nations are exempt from suit without congressional authorization. It is as though the immunity which was theirs as sovereign passed to the United States for their benefit, as their tribal properties did.* Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suit. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. (Emphasis supplied.)

309 U.S. at 512, 513. This Court has recognized that Congress must authorize any waiver of sovereign immunity for Indian tribes, *Turner* v. *United States,* 248 U.S. 354 (1919). Furthermore, the terms of any waiver should be express as to persons, courts, and procedures. *See, e.g., Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 53-54 (1943); *United States* v. *Shaw,* 309 U.S. 495, 500-501 (1940). The principles of sovereign immunity which apply to Indian tribes are no different from the concepts of sovereign immunity which have long been recognized for the United States and the states. Each of these governments is immune from those suits whose judgments will either raid the public treasury or interfere with the administration of official government functions. *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949); *Land* v. *Dollar,* 330 U.S. 731 (1947); *Great Northern Life Insurance*

Co. v. *Read,* 322 U.S. 47, 53-54 (1943); *Monaco* v. *Mississippi,* 292 U.S. 313 (1934); *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

Because Congress did not select express language to waive the sovereign immunity of tribal corporations,[9] any waiver of sovereign immunity effected by the corporate charter of the Fort Belknap Indian Community should be narrowly construed. *United States* v. *United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47 (1943); *Monaco* v. *Mississippi,* 292 U.S. 313 (1934).[10] Thus, to the extent that any waiver was accomplished by reason of the adoption of the language "to sue and to be sued" in the corporate charter of the Fort Belknap Indian Community, it is limited to proprietary and corporate business activities. Further, it is limited to a waiver with respect to income or chattels specially

[9] The language "sue and to be sued" was not used in the IRA, but rather was inserted into the corporate charters issued pursuant to the Act. In this respect, the IRA which merely provided that tribal corporations were to be granted "such further powers as may be incidental to the conduct of corporate business not inconsistent with law" utilized less explicit language than found in other congressional waivers. See, e.g., the acts creating non-Indian federal corporations which invariably use the phrase, "sue and to be sued," enumerated in Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390, n. 3 (1939).

[10] Construing the corporate charter waiver narrowly is consistent with how Congress has carefully preserved the immunity of Indian property from suit even when the immunity of federal property from suit is waived. Thus, in the Act of October 25, 1972, 86 Stat. 1176, 28 U.S.C. § 2409a, which waives the sovereign immunity of the United States for quiet title actions, Congress stated, "This section does not apply to trust or restricted Indian lands." The exemption was founded on the federal government's policy to avoid "abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians." 1972 U.S. Code Congressional and Administrative News 4547, 4556-4557.

pledged or assigned which are necessary to the conduct of corporate business not inconsistent with law. The alleged tortious conduct involved in the present dispute obviously involves no proprietary or corporate business activity of the Fort Belknap Indian Community. Nor is there involved any specific pledge of income or chattels. There is no basis, therefore, for contending that the Fort Belknap Indian Community impliedly waived its sovereign immunity from suit for the alleged tortious conduct of one of its police officials when it adopted a corporate charter.[11]

CONCLUSION

The holding of the Montana courts subjecting the Fort Belknap Indian Community to suit in a state tort action constitutes yet another unwarranted and unauthorized interference by the Montana state courts into the lives of federally protected Montana Indian tribes. The decision is in conflict with the rulings of this Court respecting waivers of sovereign immunity and is inconsistent with the rulings of other courts which have limited the waiver of sovereign immunity consented to in tribal corporate charters to suits involving tribal business activities as opposed to official tribal governmental actions. Moreover, the holding below will significantly affect the level of governmental services currently rendered by the 131 Indian tribes with IRA corporate charters. These tribes have only very limited financial resources. They cannot run the risk of exposing their tribal treasuries to a myriad of

[11] Aggrieved persons may obtain relief against arbitrary tribal actions which cause deprivations of civil rights in federal court under the provisions of the Indian Civil Rights Act, 82 Stat. 77, 25 U.S.C. § 1302, *et seq.* *See,* United States v. Mazurie, 419 U.S. 544, 558, n. 12 (1975). However, that alternative has not been attempted by Gardipee, and it is therefore not an issue in this case.

private damage suits.[12] As a result, badly needed tribal law enforcement, health, and welfare activities will be curtailed. Federal services may have to be increased to offset the loss of tribal programs.

The question of the scope of the waiver of sovereign immunity in the Indian Reorganization Act is of great importance to both Indian tribes and the federal government. This Court on two recent occasions has granted certiorari to assure that long standing federal Indian policies are not ignored and swept aside in Montana. *Kennerly* v. *District Court,* 400 U.S. 423 (1971); *Fisher* v. *District Court,* 424 U.S. 382 (1976). Petitioner requests this Court once again to exercise its powers of review and to grant a writ of certiorari to review the decision of the Supreme Court of the State of Montana.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND
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Counsel for Petitioner

December 30, 1976

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[12] The policy of protecting government treasuries from suit continues to be a primary concern of Congress. In Public Law 94-574, October 21, 1976, Congress recently amended the Administrative Procedure Act, 5 U.S.C. § 702, to eliminate the defense of sovereign immunity of the United States with respect to any action in a court of the United States seeking relief *other than money damages* based on the assertion of unlawful official action by a Federal officer or employee. The United States can now be named as a party defendant in Administrative Procedure Act cases but its treasury remains protected from judgment.

APPENDIX

SUPREME COURT OF MONTANA

Oct. 7, 1976.

No. 13443.

THE STATE OF MONTANA *ex rel.* THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, Montana, *Relator,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, and the HONORABLE BERNARD W. THOMAS, *Respondents.*

554 P.2d 1115

Philip E. Roy, Browning, presented ex parte argument.

Order

PER CURIAM:

In this original proceeding relator seeks an appropriate writ to require the district court of the twelfth judicial district, in and for the County of Blaine, to reverse and set aside its order of February 23, 1976, denying a motion to dismiss the cause entitled James W. Gardipee, Plaintiff, vs. Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, Defendants, now pending in said court.

Counsel were heard in ex parte presentation and the matter taken under advisement.

The Court now being advised denies the petition and this proceeding is ordered dismissed.

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, *Plaintiff*,

-VS-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, *Defendants*.

(Filed February 24, 1976)

Order Denying Motion to Dismiss

Defendant's motion to dismiss plaintiff's complaint on the ground that the Court lacks jurisdiction of the subject matter of the action and of the defendant, has been submitted to the Court on the briefs of counsel. Now, it appearing to the Court that (1) the action is based on acts alleged to have occurred outside the exterior boundaries of the Fort Belknap Indian Reservation, and (2) although defendant may have immunity from suit, it has waived such immunity in its corporate charter, (without consenting to the levy of any judgment, lien or attachment upon the property of the community other than income or chattels specifically pledged or assigned.) the Court concludes that it has jurisdiction of the subject matter of the action and of defendant, subject to the limitations expressed in the charter.

It is, therefore, hereby ORDERED that the motion to dismiss be and it is hereby denied. Defendant is allowed twenty (20) days from this date in which to further plead.

DATED this 2nd day of February, 1976.

/s/ B. W. THOMAS
Judge of the District Court

(Caption Omitted in Printing)

Amended Complaint

(Filed Nov. 20, 1975)

COMES Now, the above plaintiff and alleges:

For plaintiff's First Cause of Action:

1. That the defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, is a federal corporation chartered under the Act of June 18, 1934, of the United States Congress.

2. That the management and affairs of such defendant corporation are conducted by the Community Council.

3. That defendant's corporate charter contains a provision whereby it consents to be sued in courts of competent jurisdiction in the United States and that by reason of such consent, this Court has jurisdiction over the defendant with respect to the matters at issue herein.

4. The Leon Martinez, at all times herein mentioned, was employed by and acting under and within the scope of his employment as the Chief of Police for the said defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, and as such was acting in 'he performance of his duties.

5. That on or about the 4th day of October, 1974, the said Leon Martinez claims to have arrested plaintiff for driving a motor vehicle on the Fort Belknap Indian Reservation without a valid Montana vehicle operator's license.

6. That following said claimed arrest, plaintiff was ordered to accompany the said Leon Martinez in a vehicle owned by the defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, and then and there being used by Leon Martinez in the performance of his duties as such defendant's Chief of Police.

7. That at a point on U.S. Highway No. 2, approximately 1 mile west of Harlem, in Blaine County, Montana, plaintiff requested that he be allowed to leave said automobile and custody of the said Leon Martinez. That in response to such request Martinez stopped said automobile, at which time plaintiff departed therefrom and proceeded to walk back to Harlem via the Burlington Northern Railway right-of-way.

8. That while plaintiff was walking along said Burlington Northern Railway right-of-way as aforesaid, the said Leon Martinez committed an intentional, wanton, malicious, unlawful, brutal, unnecessary and unprovoked assault and battery upon the plaintiff, by shooting him with a revolver then and there loaded with bullets, one of which passed through plaintiff's left leg.

9. As a proximate result of the aforesaid gunshot wound received by plaintiff, he was severely injured. Said injuries have caused plaintiff to suffer excruciating physical and mental pain and anguish and to cause him to become permanently disabled, to his damage in the sum of $75,000.00. That plaintiff further suffered a loss of earnings by reason of such injuries amounting to the sum of $5,000.00.

For a Second, Separate, and Further Cause of Action, plaintiff incorporates herein with the same force and effect as though stated verbatim, Paragraphs 1, 2, 3, 4, 5, 6, 7, 9 of plaintiff's First Cause of Action, and further alleges:

That while plaintiff was walking along said Burlington Northern Railway right-of-way as aforesaid, the said Leon Martinez negligently shot plaintiff with a revolver then and there loaded with bullets, one of which passed through plaintiff's left leg.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. The sum of $75,000.00 general damages.
2. The sum of $5,000.00 for special damages.
3. For costs of suit incurred herein.
4. For such other and further relief as to this Court seems proper.

MORRISON, ETTIEN & BARRON

/s/ By (Illegible)
Attorneys at Law
339 Third Street
P.O. Box 1070
Havre, Montana 59501
Attorneys for Plaintiff

(Certificate of Mailing Omitted in Printing)

Corporate Charter of the Fort Belknap Indian Community, Montana

[Gros Ventre and Assiniboine]

Ratified August 25, 1937

Whereas, the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana constitutes a recognized Indian Community organized under a constitution and by-laws ratified by the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation on October 19, 1935, and approved by the Secretary of the Interior on December 13, 1935, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378); and

Whereas, more than one-third of the adult Indians on the Fort Belknap Indian Reservation who are members of

the Gros Ventre and Assiniboine Tribes have petitioned that a charter of incorporation be granted to such community, subject to ratification by vote of said Indians living on said reservation;

Now, therefore, I, Charles West, Acting Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934 (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Fort Belknap Indian Community of the Fort Belknap Reservation to be effective from and after such time as it may be ratified by a majority vote of the adult Indians living on the reservation, at an election in which at least thirty per cent of the eligible voters vote.

1. *Corporate Existence.* In order to further the economic development of the Fort Belknap Indian Community of the Fort Belknap Reservation in Montana by conferring upon the said community certain corporate rights, powers, privileges and immunities; to secure for the members of the Community an assured economic independence; and to provide for the proper exercise by the Communities of various functions heretofore performed by the Department of the Interior, the aforesaid community is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Fort Belknap Indian Community."

2. *Perpetual Succession.* The Fort Belknap Indian Community shall, as a Federal corporation, have perpetual succession.

3. *Membership* [as Amended]. The Fort Belknap Indian Community shall be a membership corporation. Its members shall consist of all persons now or hereafter members of the Community, as provided by its duly ratified and approved Constitution and By-laws, as amended.

4. *Membership* [as Amended]. The Fort Belknap Community Council consisting of six (6) members of the Gros

Ventre Tribe of Indians and six (6) members of the Assiniboine Tribe of Indians of the Fort Belknap Indian Reservation, elected by all the electors of the Community, shall exercise all the corporate powers hereinafter enumerated.

5. *Corporate Powers.* The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:

(a) To adopt, use, and alter at its pleasure a corporate seal.

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

(1) No sale or mortgage may be made by the Community of any land, or interest in land, now or hereafter held by the Community.

(2) No leases, permits (which terms shall not include land assignments to members of the Community) or timber sale contracts covering any land or interests in land now or hereafter held by the Community within the boundaries of the Fort Belknap Reservation shall be made by the Community for a longer term than ten years, and all such leases, permits, or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, mineral leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

(3) No action shall be taken by or in behalf of the Community which conflicts with regulations au-

thorized by Section 6 of the Act of June 18, 1934, or in any way operates to destroy or injure the Community grazing lands, timber, or other natural resources of the Fort Belknap Reservation.

(c) To issue interests in corporate property in exchange for restricted Indian land.

(d) To borrow money from the Indian Credit Fund in accordance with the terms of Section 10 of the Act of June 18, 1934, (48 Stat. 984), or from any other governmental agency, or from any member or association of members of the Community, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the Community; *Provided,* That the amount of indebtedness to which the Community may subject itself, aside from loans from the Indian Credit Fund, shall not exceed $2,500, except with the express approval of the Secretary of the Interior.

(e) To engage in any business that will further the economic well-being of the members of the Community or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this Charter.

(f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this Charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana, including agreements with the State of Montana for the rendition of public services: *Provided,* That any contracts, other than contracts with the United States, involving payment of money by the corporation totalling in excess of $2,000 during any one fiscal year shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(g) To pledge or assign chattels or future income due or to become due to the Community under any notes, leases, or other contracts, or from any other source, whether or not such notes, leases, or contracts are in existence at the time: *Provided,* That such agreement of assignment, other than agreements with the United States, shall not extend more than ten years from the date of execution and shall not cover more than one half the income from any source: *And provided further,* That any such agreement shall be subject to the approval of the Secretary of the Interior or his duly authorized representative.

(h) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the Postal Savings Bank or with a bonded Disbursing Officer of the United States to the credit of the community.

(i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.

(j) To exercise such further incidental powers not inconsistent with law, as may be necessary to the conduct of corporate business.

6. *Termination of Supervisory Powers.* Upon the request of the Communcity Council of the Fort Belknap Indian Community for the termination of any supervisory power reserved to the Secretary of the Interior under Sections 5(b)(2), 5(d), 5(f), 5(g), 5(h), and Section 8 of this Charter, the Secretary of the Interior, if he deems it wise

and expedient to do so, shall thereupon submit the question of such termination or grant for ratification by the Community. If the Secretary of the Interior shall approve such termination it shall be effective upon ratification by a majority vote of the adult members of the Community residing on the reservation, at an election in which at least 30 per cent of the eligible voters vote. If the Secretary shall disapprove such termination, or fail to approve or disapprove it within 90 days after its receipt, it may then be submitted by the Secretary or by the Community Council to popular referendum of the adult members of the Community actually living within the reservation, and if approved by two-thirds of the eligible voters shall be effective.

7. *Tribal Rights and Claims.* (a) Property rights and present and future claims of the Gros Ventre and Assiniboine Tribes of Indians who have entered into a partnership to form the Fort Belknap Indian Community for the management of their joint affairs, shall not be in any way impaired by anything contained in this Charter, or in the Constitution and By-Laws of the Fort Belknap Indian Community.

(b) Nothing in this Charter, or in the Constitution and By-Laws of the Fort Belknap Indian Community shall constitute a release or waiver or shall in any way impair any present or future claims of the Gros Ventre Tribe of Indians of the Fort Belknap Indian Reservation, or of the Assiniboine Tribe of Indians of the Fort Belknap Indian Reservation, against the United States, against each other, or against any other tribe or tribes of Indians.

(c) The tribal unallotted lands of the Fort Belknap Indian Reservation are hereby vested in the Fort Belknap Indian Community, subject however to the restrictions contained in Section 7, paragraph (b) of this Charter.

(d) The Gros Ventre members of the Community Council and the Assiniboine members of the Community Council shall each have sole and exclusive jurisdiction over all matters concerning the exclusive property rights and

present and future claims of each of their said tribes, and shall transact the exclusive business policy and administrative affairs of their respective tribes, and shall exercise their said several powers to the same extent and for the same purposes as exercised by each of said tribal councils prior to the ratification of the Fort Belknap Indian Community Constitution and By-laws and the granting of this Charter.

(e) That the administration of moneys borrowed by the Fort Belknap Indian Community and reloaned to members of the community or associations of such members shall be under the jurisdiction of two sub-committees of the council, one consisting only of Gros Ventre councilmen to administer all loans to Gros Ventre Indians, and one consisting only of Assiniboine councilmen to administer all loans to Assiniboine Indians. The amounts allocated to the two sub-committees shall be equal except in so far as demonstrated differences in population or need warrant any other equitable division.

8. *Corporate Dividends.* The Community may issue to each of its members a nontransferable certificate of membership evidencing the equal share of each member in the assets of the Community and may distribute per capita, among the recognized members of the Community, all income of the Community over and above sums necessary to defray corporate obligations to members of the Community or to other persons and over and above all sums which may be devoted to the establishment of a reserve fund, the construction of public works, the costs of public enterprises, the expenses of the Community government, the needs of charity, or other corporate purposes. No such distribution of profits in any one year amounting to a distribution of more than one half of the accrued surplus, shall be made without the approval of the Secretary of the Interior.

9. *Corporate Accounts.* The officers of the Community shall maintain accurate and complete public accounts of

the financial affairs of the Community, which shall clearly show all credits, debts, pledges, and assignments, and shall furnish an annual balance sheet and report of the financial affairs of the Community to the Commissioner of Indian Affairs. The Secretary Treasurer of the Fort Belknap Indian Community shall pay out money only in accordance with the orders and resolutions of the Community Council, and no disbursements shall be made without the signature or approval of the Secretary-Treasurer. The books of the Secretary-Treasurer shall be audited at the direction of the Community Council or of the Commissioner of Indian Affairs, and shall be open to inspection by members of the Community or duly authorized representatives of the Secretary of the Interior at all reasonable times.

10. *Amendments.* This Charter shall not be revoked or surrendered except by Act of Congress, but amendments may be proposed by resolutions of the Community Council which if approved by the Secretary of the Interior, to be effective shall be ratified by a majority vote of the adult members living on the reservation at a popular referendum in which at least 30 per cent of the eligible voters vote.

11. *Ratification.* This Charter shall be effective from and after the date of its ratification by a majority vote of the adult members of the Fort Belknap Indian Community living on the Fort Belknap Reservation, provided at least 30 per cent of the eligible voters shall vote; such ratification to be formally certified by the Superintendent of the Belknap Indian Community.

Submitted by the Acting Secretary of the Interior for ratification by the Fort Belknap Indian Community in a popular referendum to be held on August 25, 1937.

CHARLES WEST
Acting Secretary of the Interior

Washington, D. C., July 29, 1937.

[Seal]

CERTIFICATION

Pursuant to Section 17 of the Act of June 18, 1934 (48 Stat. 984), this Charter, issued on July 29, 1937, by the Acting Secretary of the Interior to the Fort Belknap Indian Community of the Fort Belknap Reservation, was duly submitted for ratification to the adult Indians living on the Reservation and was on August 25, 1937, duly carried by a vote of 277 for and 158 against, in an election in which over thirty percent of those entitled to vote cast their ballots.

RICHARD KING,
President of the Fort Belknap Indian Community.

F. W. BOYD
Superintendent of Fort Belknap Agency.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76- 119

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Petitioner,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statutes Involved	2
Statement of the Case	2
Reasons for Denying Writ	3
Conclusion	5
Appendix	6

TABLE OF AUTHORITIES

	Page
Cases:	
MARTINEZ v. SOUTHERN UTE TRIBE, 374 P2d. 691 (Colo. 1962)	3
FONTONELLE v. OMAHA TRIBE OF NEBRASKA, 430 F2d. 143 (1970)	3
PEOPLE v. STREEPER, (1957) 12 ILL. 2d. 204, 145 N.E2d. 625	4
HALL v. UNIVERSITY OF NEVADA, (1972) 105 Cal. Rptr. 355, 503 P2d. 1363	4-5
Statutes:	Page
25 U.S.C.A. #476	3
Constitutional Provisions:	Page
Article II, Sec. 4 1972 Constitution of Montana	4
Article II, Sec. 16, 1972 Constitution of Montana	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Petitioner,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Distri t Court of the Twelfth Judicial District of the State of Montana, In and For the County of Blaine, and the Honorable Bernard W. Thomas, District Court Judge, Respondents, pray that the Petition For Writ Of Certiorari be denied.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 554 P2d. 1115 (Mont. 1976), and the district court's order. (Petitioners Appendix p. 29)

JURISDICTION

Respondents adopt Petitioner's jurisdictional statement.

QUESTIONS PRESENTED

Respondents adopt the questions presented in their petition.

STATUTES INVOLVED

Respondents adopt Petitioner's statement of involved.

STATEMENT OF THE CASE

The Respondents accept Petitioner's Statement of the Case with the following corrections and additions.

There is nothing in the pleadings or records of this case indicating that Gardipee was being transported to the Blaine County Jail for purposes of incarceration pending posting of bail bond.

Procedurally, other than the Amended Complaint, no evidence by way of discovery or otherwise has been developed or presented either to the Montana Supreme Court or before the District Court of the Twelfth Judicial District. On each of the two occasions where Petitioner filed a Petition for Writ of Supervisory Control on Other Appropriate Writ with the Montana Supreme Court, the matter was heard ex parte. Counsel for Respondents were not notified and made no appearance for oral argument. No findings of fact or conclusions of law have been made by the Montana Courts.*

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* Order Denying Motion to Dismiss, Motion for Extension of Time to Further Plead, Motion to Dismiss, Motion to Dismiss Defendant's Second Motion to Dismiss, Order Striking Defendant's Second Motion to Dismiss, Order of May 13th, Order of June 14th, Order of May 18th, Motion to Reduce Time Within Which to Further Plead, Order of June 22nd, Default, Notice of Application for Default Judgment, Motion to Further Stay All Proceedings, Order Entering Default, Notice of Entry of Default, Answer, Motion to Set Aside Default Judgment, Affidavit

- 2 -

REASONS FOR DENYING WRIT

The Montana Court has apparently alligned itself with the Colorado Court in holding that by adopting incorporation under 25 U.S.C.A. #476 and consenting to sue and be sued in courts of competent jurisdiction within the United States, the Fort Belknap Indian Community has rendered itself amenable to the courts of the State of Montana in any action which the state courts may take cognizance. The tribe has recourse to the state courts for the protection of its own rights and is answerable in said courts to these who assert claims against it. MARTINEZ v. SOUTHERN UTE TRIBE, 374 P2d. 691 (Colo. 1962). The Colorado Court did not limit itself to simply "identified business transactions" but expressly included "any" action of which the state court may take cognizance. @ By adopting provisions in its corporate charter consenting to sue and be sued, the Nebraska Court has held a Tribe has rendered itself amenable to a quiet title action. FONTONELLE v. OMAHA TRIBE OF NEBRASKA, 430 F2d. 143 (1970)

@ "The defendant by adopting incorporation under 25 U.S.C.A. #476 and consenting to sue and be sued in courts of competent jurisdiction within the United States, has rendered itself amenable to the courts of the State of Colorado in any action of which the state courts may take cognizance. It has recourse to the state courts for the protection of its own rights and is answerable in said courts to those who assert claims against it". MARTINEZ v. SOUTHERN UTE TRIBE, (Supra.) Page 694

- 3 -

The waiver of sovereign immunity contained in the sue and be sued provisions in this corporate charter does not distinguish between the governmental and business functions of the Tribe. The only limitation is in the levy of a judgment lien or attachment. The question of satisfying any judgment which might be obtained is not at issue at this time. However, it is respondents understanding, based upon information received but which has not yet been fully confirmed, that the Tribe is fully protected from judgment by reason of it having purchased a policy of liability insurance. If this proves to be the case then the same may be considered as "specially pledged or assigned" for purpose of satisfying any such judgment.

Montana is a free, sovereign, and independent state whose citizens shall not be denied the equal protection of the laws. (Article II, Sec. 4 1972 Constitution of Montana). The Courts of Justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character. (Article II, Sec. 16, 1972 Constitution of Montana). To deny Citizens of Montana recourse to its courts for torts committed by an Indian Tribe while engaged in activities outside the exterior boundaries of the reservation, would be a denial of these constitutional rights.

The right of a sovereign does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference. PEOPLE v. STREEPER, (1957) 12 Ill. 2d. 204, 145 N.E2d. 625; HALL v. UNIVERSITY OF NEVADA, (1972) 105 Cal.

-4-

Rptr. 355, 503 P2d. 1363.

An Indian Tribe which engages in activities outside the reservation but within Montana, should be subject to the laws of the State of Montana with respect to those activities and a proper party to suit in the Montana Courts. When the Fort Belknap Indian Community enters into activities, outside the reservation and within the State of Montana, it is not exercising sovereign power over the citizens of this State and is not entitled to the benefits of the sovereign immunity doctrine as to those activities unless Montana has conferred immunity by law as a matter of comity, which it has not done.

CONCLUSION

The Petition for a Writ of Certiorari should be denied for the following reasons:

1. By adopting a provision in its corporate charter consenting to sue and be sued, the Petitioner has rendered itself amenable to the jurisdiction of the Courts of Montana for torts committed by its agents off the reservation.

2. The Petitioner does not have sovereign immunity from a suit for torts committed by its agents off the reservation.

Respectfully submitted,

ROBERT D. MORRISON
MORRISON, ETTIEN & BARRON
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501

COUNSEL FOR RESPONDENTS

-5-

-5-

APPENDIX

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendants.

No. 7201

FILED

FEB 20 1976

CLERK OF DISTRICT COURT

BY _____ DEPUTY CLERK

ORDER DENYING MOTION TO DISMISS

Defendant's motion to dismiss plaintiff's complaint on the ground that the Court lacks jurisdiction of the subject matter of the action and of the defendant, has been submitted to the Court on the briefs of counsel. Now, it appearing to the Court that (1) the action is based on acts alleged to have occurred outside the exterior boundaries of the Fort Belknap Indian Reservation, and (2) although defendant may have immunity from suit, it has waived such immunity in its corporate charter, (without consenting to the levy of any judgment, lien or attachment upon the property of the community other than income or chattels specifically pledged or assigned.) the Court concludes that it has jurisdiction of the subject matter of the action and of defendant, subject to the limitations expressed in the charter.

It is, therefore, hereby ORDERED that the motion to dismiss be and it is hereby denied. Defendant is allowed twenty (20) days from this date in which to further plead.

DATED this ~~20th~~ 23rd day of February, 1976.

R. H. Henry

Judge of the District Court

STATE PUBLISHING CO. HELENA, MONT.

Blank No. 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FT. BELKNAP INDIAN COMMUNITY

Defendant

Affidavit of Mailing

STATE OF MONTANA, County of Blaine } ss.

Eleanor Felton, being duly sworn, say that she is Clerk of said Court; that on the 23d day of February 19 76, she mailed, with the proper postage prepaid thereon, correct and true copies of

Order Denying Motion to Dismiss

in the above entitled case and addressed to:

Philip E. Roy, P. O. Box 849, Browning, Mt. 59417;

Morrison, Ettien & Barron, Attys at Law, Havre, Montana 59501

Eleanor Felton

Subscribed and sworn to before me this 23d day of February A.D. 19 76

Esther Dougherty

Notary Public for the State of Montana
Residing at Chinook, Mt.
My Commission expires Jan. 25, 1979

STATE PUBLISHING CO. HELENA, MONT

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * *

NO. 7301

FILED
MAR 9 1976
Eleanor Felton
CLERK OF DISTRICT COURT
BY
DEPUTY CLERK

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendants.

No. 7301

MOTION FOR EXTENSION OF TIME TO FURTHER PLEAD

* * * * * * * * * * * *

COMES NOW, the Defendant, the Fort Belknap Indian Community, above named and moves the Court for an extension of twenty (20) days from March 15, 1976 within which to further plead this matter. This Motion is made on the grounds that additional time is required by Defendant to properly research the matter in light of the fact that the Court had denied the Defendants, Fort Belknap Indian Community, Motion to Dismiss based on the lack of jurisdiction of the subject matter and the Defendant.

Dated this 4th day of March, 1976.

Philip E. Roy

PHILIP E. ROY, Attorney for Defendants
Fort Belknap Indian Community
P. O. Box 849
Browning, Montana 59417

ORDER

Upon reading and filing the foregoing Motion of Defendants, and good cause appearing therefore, it is ordered that the Defendants, may have until and including the 4th day of April, 1976, within which to plead.

M-5 J-158

B.W. Thomas

HONORABLE B.W. THOMAS, Judge of the District Court
Twelfth Judicial District

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * * * *

FILED APR 7301
Eleanor Felton
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE,

Plaintiff,

vs.

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

MOTION TO DISMISS

* * * * * * * * * * * * * *

COMES NOW the defendant, the Fort Belknap Indian Community and moves to dismiss the Amended Complaint of Plaintiff on file herein on the following grounds:

That the Amended Complaint fails to state a claim against defendant upon which relief can be granted.

DATED this 2nd day of April, 1976.

Philip E. Roy

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Montana 59417

CERTIFICATION OF MAILING

I, PHILIP E. ROY, Attorney for Defendant, do hereby certify that I mailed a full and true copy of the within Motion to Dismiss at Browning, Montana, on the 2nd day of April, 1976, directed to the following:

Morrision, Ettien & Barrow
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501

Attorneys for Plaintiff.

Philip E. Roy

PHILIP E. ROY, Attorney at Law
Attorney for Defendant

STATE PUBLISHING CO. HELENA, MONT

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * * * * * * * * * * * * * * * * *

FILED APR 7301
Eleanor Felton
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE, : No. 7301

Plaintiff, :

-v- : MOTION TO DISMISS

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, : DEFENDANT'S SECOND MOTION TO DISMISS

Defendant. :

* * * * * * * * * * * * * * * * * * * *

COMES NOW, the aboye plaintiff and moves this Court for an order dismissing the Motion to Dismiss filed by defendant on the 2nd day of April, 1976, for the reasons and upon the grounds that all of the issues raised by defendant in his motion and brief were considered by this Court previously in entering its Order Denying Motion to Dismiss dated the 23rd day of February, 1976. That said Motion to Dismiss is frivolous, sham and redundant and defendant is therefore in default for failure to further plead as previously ordered by this Court.

DATED This 16th day of April, 1976.

MORRISON, ETTIEN & BARRON
Attorneys at Law
339 Third Street
P. O. Box 1070
Havre, Montana 59501
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This 16th day of April 76

By

339 Third Street, Havre, Montana 59501

MORRISON, ETTIEN & BARRON
ATTORNEYS AT LAW
339 THIRD STREET
P.O. BOX 1070
HAVRE, MONTANA 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

ORDER STRIKING DEFENDANT'S SECOND MOTION TO DISMISS

Since it appears that defendant's second motion to dismiss plaintiff's amended complaint raises the same issue as that raised by its first motion and is therefore redundant and subject to a motion to strike, plaintiff's motion to dismiss defendant's second motion is deemed a motion to strike and is granted.

It is, therefore, hereby ORDERED that defendant's second motion to dismiss be and it is hereby stricken and defendant is allowed fifteen (15) days from this date in which to plead to the amended complaint.

DATED this 28th day of April, 1976.

B. W. Thomas

Judge of the District Court

M-5 p.166

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,

Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.

No. 7301

O R D E R

Upon oral application of Philip E. Roy, Attorney at Law, Attorney for Fort Belknap Indian Community, the Court having been advised that Defendant Tribes on the 12th day of May, 1976, filed with the Supreme Court of the State of Montana, its Petition and Application for a Writ of Supervisory Control, requesting that the Supreme Court of the State of Montana grant appropriate relief as to the jurisdiction of the State District Court, and further cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Fort Belknap Indian Community, is hereby granted thirty (30) days from and after the 13th day of May, 1976 in which to further plead, or until such time as the Supreme Court of the State of Montana renders a final opinion as to the jurisdiction of the State District Court.

DATED this 14th day of May, 1976.

B. W. Thomas

HONORABLE BERNARD W. THOMAS
District Judge
Twelfth Judicial District

NO. 7301
FILED
Eleanor Zelton
CLERK OF DISTRICT COURT
BY ..... DEPUTY CLERK

M-5 p.168

STATE PUBLISHING CO. HELENA, MONT.

Blank No. 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FT. BELKNAP INDIAN COMMUNITY

Defendant

Affidavit of Mailing

STATE OF MONTANA, }
County of Blaine } ss.

Eleanor Felton, being duly sworn, say that she is Clerk of said Court; that on the 14th day of May 19 76 she mailed, with the proper postage prepaid thereon, correct and true copies of Order in the above entitled case and addressed to:

Philip E. Roy, Box 849, Browning, Mt. 59417;

Morrison, Ettien & Barron, Attorneys at Law, Havre, Mt. 59501

Eleanor Felton

Subscribed and sworn to before me this 14th day of May, A.D. 19 76.

Esther Dougherty
NOTARY PUBLIC for the State of Montana
Residing at Chinook, Mt.
My Commission expires Jan. 25, 1979.

Entered 7301

Entered accordingly

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE,
Plaintiff,
-vs-
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,
Defendant.

No. 7301

ORDER

Upon oral application of Philip E. Roy, Attorney at Law, Attorney for Fort Belknap Indian Community, the Court having been advised that Defendant Tribes on the 11th day of June, 1976, filed with the Supreme Court of the State of Montana, its Petition and Application for Writ of Supervisory Control, requesting that the Supreme Court of the State of Montana grant appropriate relief as to the jurisdiction of the State District Court, and further cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Fort Belknap Indian Community, is hereby granted thirty (30) days from and after the 14th day of June, 1976 in which to further plead, or until such time as the Supreme Court of the State of Montana renders a final opinion as to the jurisdiction of the State District Court.

DATED this 14th day of June, 1976.

HONORABLE BERNARD W. THOMAS
District Judge
Twelfth Judicial District

STATE PUBLISHING CO. HELENA, MONT.

14-5-1771

Blank No 66

In the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine

JAMES W. GARDIPEE

Plaintiff

vs.

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant

Affidavit of Mailing

STATE OF MONTANA, County of Blaine } ss.

Esther Dougherty, being duly sworn, says that she is Deputy Clerk of said Court; that on the 14th day of June 1975 she mailed, with the proper postage prepaid thereon, correct and true copies of an Order in the above entitled case and addressed to: Philip E. Roy, Box 349, Browning, Mt. 59417 Morrison, Ettien & Barron, Attorneys at Law, Havre, Mt. 59501

Esther Dougherty

Subscribed and sworn to before me this 14th day of June A.D. 19 76

Notary Public for the State of Montana
Residing at Chinook, Montana
My Commission expires 1-6-78

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13374

THE STATE OF MONTANA ex rel. THE FORT BELKNAP INDIAN COMMUNITY of THE FORT BELKNAP INDIAN RESERVATION, MONTANA,

Relator,

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, In and For the County of Blaine and the HONORABLE BERNARD W. THOMAS,

Respondents.

ORDER

PER CURIAM:

After hearing the matter ex parte, it appears that there are relevant factual disputes that cannot be resolved by this Court and thus supervisory control is not proper. Accordingly the petition is denied without prejudice.

DATED this 18th day of May, 1976.

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

NO. 7301

FILED
JUN 17 1976
Eleanor Sabol
CLERK OF DISTRICT COURT
BY Esther Dougherty
DEPUTY CLERK

JAMES W. GARDIPEE, Plaintiff,

-vs-

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.

NO. 7301

MOTION TO REDUCE TIME WITHIN WHICH TO FURTHER PLEAD

COMES NOW, the above defendant and moves this Court for an Order reducing the time in which defendant shall further plead in this matter for the following reasons:

That defendant has heretofore petitioned the Montana Supreme Court for a Writ of Supervisory Control or other appropriate writ. By its Order dated the 18th of May, 1976, a copy of which is attached hereto, the Montana Supreme Court entered its Order denying said petition.

That there are no matters presently before the Supreme Court and defendant's continuing requests for additional time to further plead are designed to delay this matter and to prevent an early and expeditious resolution of the issues presented by plaintiff's Complaint.

WHEREFORE, plaintiff respectfully requests this Court to reduce the time within which defendant shall further plead.

DATED this 16 day of June, 1976.

MORRISON, ETTIEN & BARRON

339 Third Street
P.O. Box 1070
Havre, Montana 59501

ATTORNEYS FOR PLAINTIFF

MORRISON, ETTIEN & BARRON
ATTORNEYS AT LAW
339 THIRD STREET
P.O. BOX 1070
HAVRE, MONTANA 59501

CERTIFICATE OF MAILING

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address this 16 day of June, 1976.

MORRISON, ETTIEN & BARRON

By _____

339 Third Street, Havre, Montana 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* * * * *

JAMES W. CARDIPEE,

Plaintiff,)

vs.)

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA,

Defendant.)

No. 7301

O R D E R

* * * *

Plaintiff having filed his motion to reduce the time within which defendant must plead to plaintiff's complaint, and good cause appearing therefor,

It is hereby ORDERED that the Order of this Court dated June 14, 1976, be and it is hereby modified to allow defendant until July 6th, 1976, or until five (5) days after the Supreme Court of Montana disposes of defendant's second application for a writ of supervisory control, whichever date is earlier, within which to further plead to plaintiff's complaint.

Dated this 22d day of June, 1976.

B W Thomas

Judge of the District Cort

cc Roy
Morrison

NO. 7301
FILED
JUN 22 1976
Eleanor Zelton
CLERK OF DISTRICT COURT
BY _____ DEPUTY CLERK

M-5-p 171

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : NO. 7031

Plaintiff, :

-vs- : DEFAULT

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA. :

Defendant. :

* *

FILED

In this action the Defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, having been regularly served with process, and having failed to appear and further plead by July 6, 1976, as previously ordered by this Court by its Order dated June 22, 1976, the default of said Defendant in the premises is hereby duly entered according to law.

ATTEST, my hand and the Seal of said Court this 14th day of September, 1976.

CLERK OF THE DISTRICT COURT

Yvonne Gilbert

DEPUTY CLERK

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : NO. 7301

Plaintiff, :

-vs- :

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, : NOTICE OF APPLICATION FOR DEFAULT JUDGMENT

Defendant. :

* *

FILED

TO: FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA AND TO PHILIP E. ROY, ITS ATTORNEY

PLEASE TAKE NOTICE That on September 28, 1976, at 10:00 o'clock A.M. or as soon thereafter as counsel can be heard, the undersigned will make application to the Court in the above-entitled action for Judgment as prayed for in plaintiff's Complaint.

This application will be made on the grounds that you are in default in that you have failed to appear and further plead by July 6, 1976, as previously ordered by this Court by its Order dated June 22, 1976, and that applicant is entitled to Judgment against you as prayed for.

DATED this 13th day of September, 1976.

MORRISON, ETTIEN & BARRON

Attorneys at Law
339 Third Street
P.O. Box 1070
Havre, Montana 59501

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address this 13th day of September 1976

MORRISON, ETTIEN & BARRON

By

339 Third Street, Havre, Montana 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, Plaintiff,	)	No. 7301
-vs-	)	MOTION TO FURTHER STAY
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	)	ALL PROCEEDINGS

* *

COMES NOW, the Defedant, The Fort Belknap Indian Community of the Fort Belknap Indian Reservation and moves the above-entitled Court to further stay all proceedings pending an Order from the Montana Supreme Court on Defendant's application for presentation of a Writ of Supervisory Control or other appropriate writ to be set by the Montana Supreme Court.

DATED this 14th day of September, 1976.

PHILLIP E. ROY, Attorney at Law
Attorney for Defendants
P.O. Box 849
Browning, Montana 59417

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, Plaintiff,	:	No. 7031
-v-	:	ORDER ENTERING DEFAULT
FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	:	

* *

This matter having come on for hearing on the 28th day of September, 1976, by reason of plaintiff's Notice of Application for Default Judgment, the plaintiff appearing through his attorney Robert D. Morrison, Esq., the defendant not appearing either in person or through its attorney of record. It further appearing to the Court that defendant was regularly served with a copy of such notice and did not appear in response thereto and has therefore made no objection to or shown any just cause why its default should not be entered herein and plaintiff granted the relief prayed for in his Complaint; and the Court being fully advised in the premises and good cause appearing:

IT IS HEREBY ORDERED That defendant, Fort Belknap Indian Community of the Fort Belknap Reservation, Montana, be, and it hereby is, adjudged to be in default in this action, and that such default shall be entered forthwith.

IT IS FURTHER ORDERED That plaintiff shall have judgment against defendant on the Complaint for such sum as shall be determined and found as damages in proceedings before this Court and jury to be held on a date to be fixed by this Court.

DATED This 28th day of September, 1976.

Judge

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

* *

JAMES W. GARDIPEE, : No. 7031

Plaintiff, :

-v- : NOTICE OF ENTRY OF DEFAULT

FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, :

Defendant. :

* *

TO: PHILIP E. ROY, Attorney for the above-named defendant:

You are hereby notified that on the 28th day of September, 1976, judgment by default was entered against defendant in the above entitled action and in favor of the above-named plaintiff.

DATED This 28th day of September, 1976.

Clerk of the District Court

By _____
Deputy Clerk

Copy mailed to Philip E. Roy
October 19th, 1976.

P. O. Box 849
Browning, Montana 59417

CERTIFICATE OF MAILING

I, PHILIP E. ROY, hereby certify that on the 8th day of November, 1976, I deposited in the Post Office at Browning, Montana, in an envelope securely sealed with postage thereon prepaid and addressed to:

Robert D. Morrison
Attorney at Law
339 Third Street
Havre, Mt. 59501

a true and correct copy of the foregoing Answer in the above entitled action.

PHILIP E. ROY
Attorney for Defendant

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT
OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP RESERVATION, MONTANA, Defendant.	No. 7301

A N S W E R

COMES NOW the Defendant, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation, and for its answer to Plaintiff's Complaint on file herein, hereby admits, denies and alleges as follows:

I.

Defendant denies each and every allegation, matter and thing contained in Plaintiff's Complaint on file herein.

II.

Defendant makes this answer to Plaintiff's Complaint, on file herein, as a special appearance and only for the purpose of excepting to the jurisdiction of the State District Court and Defendant expressly reserves the right to object at any and all times to the jurisdiction of the District Court of the Twelfth Judicial District, in and for the County of Blaine.

WHEREFORE, Defendant prays:

1) That the Plaintiff's Complaint be dismissed.

2) For costs and disbursements by Defendant.

3) For such other and further relief as that this Court may deem just and equitable.

DATED this 8th day of November, 1976.

PHILIP E. ROY, Attorney for Defendant

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Defendant.	No. 7301 MOTION TO SET ASIDE DEFAULT JUDGMENT

COMES NOW the Defendant, the Fort Belknap Indian Community of the Fort Belknap Indian Reservation and files this Motion with this Honorable Court to set aside the default judgment which was filed on the 19th day of October, 1976 against the Defendant for the reasons contained in Defendant's Counsel's accompanying affidavit.

DATED this 12th day of January, 1977.

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Mt. 59417

ACKNOWLEDGEMENT OF SERVICE

I HEREBY CERTIFY that I was served with a true and correct copy of the foreoing "Motion to Set Aside Default Judgment" in the above-entitled action on this 12th day of January, 1977 by Defendant's Counsel.

ROBERT D. MORRISION
Attorney for Plaintiff
P. O. Box 1070
Havre, Mt. 59501

Court to stay all proceedings on the 14th day of September, 1976, pending their Petition for Writ of Certiorari to the United States Supreme Court, which was never acted upon by this Court.

6. That Defendant has not been using delaying tactics but has been moving diligently on its Petition for Writ of Certiorari to the United States Supreme Court.

7. That notwithstanding the jurisdictional issue involved in this case; the case should be heard on its merits because there are certainly controversial issues as to liability which can only be resolved in full litigation.

8. That Defendant has moved within a reasonable time pursuant to Rule 60(b)(6) Montana Rules of Civil Procedure to set aside the default judgment after exhausting all efforts with Plaintiff's Counsel to set aside the default judgment.

DATED this 12th day of January, 1977.

PHILIP E. ROY, Attorney at Law
Attorney for Defendant
P. O. Box 849
Browning, Mt. 59417

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that I was served with a true and correct copy of the foregoing "Affidavit" in the above entitled action on this 12th day of January, 1977, by Defendant's Counsel.

ROBERT D. MORRISON, Attorney at Law
Attorney for Plaintiff
P. O. Box 1070
Havre, Mt. 59501

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE

JAMES W. GARDIPEE, Plaintiff, -vs- FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, Defendant.	No. 7301 AFFIDAVIT

FILED

COMES NOW Defendant's Counsel, Philip E. Roy, and files this Affidavit in support of Defendant's Motion to Set Aside the Default Judgment filed against the Defendant on October 19, 1976 for the following reasons:

1. That Defendant was not being dilitory but was adamantly contesting the issue of jurisdiction in the Montana State Supreme Court on a Petition for Writ of Supervisory Control.

2. That Defendant received on the 11th day of June, 1976, thirty (30) days from and after the 14th day of June, 1976, within which to further plead or until such time as the Montana Supreme Court renders a final determination.

3. That Plaintiff filed a Motion to Reduce the Time in which Defendant could plead; and the time was reduced until the 6th day of July, 1976, or until five (5) days after the Montana State Supreme Court disposes of the matter. However, the Order indicated "whichever date is earlier". Since Defendant has no control over the calendar it was assumed that this was to mean whichever date is later.

4. That Defendant had been attempting to stipulate with Plaintiff's Counsel in which the default was to be set aside, however, the answer which Defendant submitted was not satisfactory to Plaintiff's Counsel.

5. That Defendant made a motion to the State District

DISTRIBUTED
JUN 4 77

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

REPLY BRIEF OF PETITIONER

PHIL ROY
FRANK LAMEBULL
P. O. Box 849
Browning, Montana 59417

DANIEL H. ISRAEL
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, AND THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

REPLY BRIEF OF PETITIONER

This reply brief is submitted pursuant to Rule 24(4) of the Supreme Court Rules, in response to the Memorandum for the United States as Amicus Curiae filed in May, 1977.

I.

The United States, while agreeing with the Fort Belknap Indian Community on the merits [Mem. p. 6,

n.9], concludes nevertheless that the Community's Petition for Writ of Certiorari should not be granted at this time, because in its view the decision of the Supreme Court of Montana rendered without opinion could have been based upon an adequate and independent non-federal ground. We respectfully disagree with the United States' conclusion that this Court lacks jurisdiction to grant our Petition for the following reasons:

A. The United States relies on *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1951), to support its view that where the highest court of the state renders no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction. But, *Stembridge* v. *Georgia* involved a case where the federal question was not properly raised pursuant to state procedures before the highest state court. However, where, as in the present case, exclusively federal questions have been timely and properly raised before the highest state court, and the highest court renders an adverse decision without an opinion, this Court has found jurisdiction to review the case. *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 254-258 (1957). *See also, Cicenia* v. *LaGay,* 357 U.S. 504, n.2 (1958).

B. The United States relies on *State ex rel. Kosena* v. *District Court,* 560 P.2d 522 (Mont. 1977), to support its view that the Montana Supreme Court may have refused to issue its writ because it found no "extraordinary and compelling circumstances" to justify interrupting the normal trial and appeal process. But, the "extraordinary and compelling circumstances" rule was established by the Montana Supreme Court where relief was sought from a district court's denial of a motion for summary judgment. A different rule operates where the relief sought deals with the district court's jurisdiction, *State ex rel. Amsterdam Lumber Inc.* v. *District Court,* 516 P.2d 378 (Mont. 1973), or where the relief sought deals solely with a question of law whose early resolution would eliminate expensive and needless litigation. *Walker* v. *Tschache,* 510 P.2d 9 (Mont. 1973); *State Highway Commission* v. *District Court,* 499 P.2d 1228 (Mont. 1972). In such circumstances the Montana Supreme Court has regularly entertained requests for supervisory control.

C. If the Montana Supreme Court relied on state procedural grounds for its denial as is suggested by the United States, why did it deny petitioner's first request for supervisory control and request clarification as to whether the alleged tortious conduct of the tribal police officer occurred on or off the Fort Belknap Indian Reservation [Pet. p. 8]? If the Montana Supreme Court concluded that extraordinary relief was not appropriate under state procedures it would have indicated so initially rather than seeking clarification of certain facts which relate solely to the federal jurisdictional issues raised by the Fort Belknap Indian Community.

D. We are disturbed by the speculation of the United States that the Montana Supreme Court may have refused to issue its writ because of the existence of a factual question as to whether the Fort Belknap Indian Community's police force operates pursuant to corporate rather than governmental powers [Mem. p. 6]. No such factual question exists. Article V, Section 1(i) of the Tribe's 1935 Constitution expressly authorizes the establishment of law enforcement ordinances. The Community's Corporate Charter omits any reference to law enforcement.

E. We question the United States' often-stated concern for a more suitable record in a case challenging the sovereign immunity of an Indian tribe in a state court. Whatever factual record that may be developed through a trial will not add or take away from the fundamental federal question of sovereign immunity which has been properly raised by the Fort Belknap Indian Community. Moreover, the underlying purpose for sovereign immunity, to protect the sovereign from unconsented suit, wil' be seriously compromised if a Montana Indian tribe is forced to defend itself in a protracted state court proceeding, particularly where the United States, acting as trustee, agrees with the Tribe that congressional consent is lacking.

II.

Review of the scope of the waiver of sovereign immunity contained in the Indian Reorganization Act, Act of June 18, 1934, should not be postponed by this Court, because this Court has recently agreed to review the scope of the waiver of soverign immunity contained in the Indian Civil Rights Act, Act of April 11, 1968. *Santa Clara Pueblo* v. *Martinez,* 540 F.2d 1039 (10 Cir. 1976), *cert. granted,* 45 U.S.L.W. 3745 (May 16, 1977). These two Acts are the only congressional expressions relating to a waiver of the sovereign immunity of Indian tribes. They should be considered together.

For the above reasons petitioner submits that the Petition for a Writ of Certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-919

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, *Petitioner,*

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF BLAINE, and THE HONORABLE BERNARD W. THOMAS, DISTRICT COURT JUDGE, *Respondents.*

BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

	Page
CONSENT TO FILING OF BRIEF AMICUS CURIAE	1
INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE	2
REASONS FOR GRANTING THE WRIT	4
I. The question whether Indian Tribes that ratified corporate charters pursuant to section 17 of the Indian Reorganization Act thereby waived their immunity from legal suits arising from tribal actions of any nature, both corporate and governmental, is a federal question of supreme importance to all Indian tribes and never has been considered by this Court	4
II. The Montana Supreme Court's expansive interpretation of the "sue and be sued" charter provision conflicts in principle with the decisions of this Court and of the lower courts establishing the doctrines of Indian tribal immunity and governmental immunity	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Cohens v. Virginia, 19 U.S. 120, 6 Wheat. 264 (1821)	9
Dicke v. Cheyenne-Arapaho Tribes, Inc., 304 F.2d 113 (10th Cir. 1962)	8
Edelman v. Jordan, 415 U.S. 651 (1974)	8
Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973)	9
Martinez v. Southern Ute Tribe, 374 P.2d 691 (Colo. 1962)	6

	Page
Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966)	6
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	4, 5
Morton v. Mancari, 417 U.S. 535 (1974)	3
Turner v. United States, 248 U.S. 354 (1919)	8
United States v. Mazurie, 419 U.S. 544 (1975)	8
United States v. Shaw, 309 U.S. 495 (1940)	8
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940)	8, 9
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	3, 8
STATUTES:	
Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975)	9
Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970)	4
25 U.S.C. § 473a (1970)	7
25 U.S.C. § 476 (1970)	4
25 U.S.C. § 477 (1970)	2, 4, 6, 7
DECISIONS OF THE DEPARTMENT OF THE INTERIOR:	
Memo. Sol. I.D., M-36545, Dec. 16, 1958 (unpublished)	6
Memo. Sol. I.D., M-36515, 65 DEC. DEP. OF INT. 483 (1958)	5-6
Memo. Sol. I.D., M-36119, 61 DEC. DEP. OF INT. 8 (1952)	5
Memo. Sol. I.D., 57 DEC. DEP. OF INT. 145 (1940)	6
Memo. Sol. I.D., March 25, 1939 (unpublished)	6
Memo. Sol. I.D., Dec. 11, 1937 (unpublished)	6
MISCELLANEOUS:	
F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (U. N. Mex. 1971)	3, 4, 5, 8
Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279 (1935)	4
Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972)	4

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BRIEF OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Petitioner and both Respondents have consented in writing to this brief. Copies of such consent have been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION AS AMICUS CURIAE

The National Tribal Chairmen's Association (NTCA) is a voluntary, non-profit organization composed of the chairmen, presidents, governors, or chiefs of reservation Indians or federally recognized Indian tribes with federal trust lands or whose members live on or near federal reservations having a local governing entity. The heads of all Alaska Native Regional Corporations are also eligible for membership. NTCA members all are leaders duly elected or appointed by their people according to their tribal constitutions or governing instruments. Approximately 190 federally recognized tribes having a population of around 90 percent of the approximately 800,000 American Indians are represented in NTCA. The purpose of NTCA, as an official voice of American Indian leaders, is to encourage the preservation of Indian cultures and to promote economic, political, and social progress among Indian people. NTCA declares it its purpose, among other things, to ensure that the historic trust relationship between the United States and the reservation Indians, including federally recognized tribes, is not impaired or terminated and to employ treaty rights and privileges for the promotion and protection of the human and natural resources of Indian reservations or groups and federally recognized tribes.

In this case, Petitioner seeks plenary Supreme Court review of a decision by the Montana Supreme Court that the Fort Belknap Indian Community, in its corporate charter ratified pursuant to section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1970), waived its immunity from suit for damages for an alleged tort committed by a tribal police officer

in connection with a lawful arrest. The charter provision in question is section 5(i), which provides:

> The Community, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said community, or in this Charter, shall have the following corporate powers:
>
> . . . .
>
> (i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued shall not be deemed a consent by the Community or by the United States to the levy of any judgment, lien or attachment upon the property of the Community other than income or chattels specially pledged or assigned.[1]

NTCA has a clear and vital interest in the interpretation of this "sue and be sued" provision. The Chairman of the Fort Belknap Indian Community is a member of NTCA. As a spokesman and representative for the reservation-based and federally recognized Indian tribes of this country, to whom the Government owes a unique responsibility, *Morton v. Mancari,* 417 U.S. 535, 551-52 (1974), NTCA must challenge vigorously any encroachment upon Indian tribal sovereignty, so long recognized and protected by this and other courts, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U. N. Mex. 1971). This is, we submit, what the Montana Supreme Court has done, in a manner unforeseen and prohibited by Congress in its passage

---

[1] The corporate charter of the Fort Belknap Indian Community is included fully in the Appendix to the Community's petition to this Court for a Writ of Certiorari.

of the Indian Reorganization Act, by the Department of the Interior and the tribes that developed these charters, and by this Court in its consistent decisions protective of Indian tribal sovereignty.

REASONS FOR GRANTING THE WRIT

I. The Question Whether Indian Tribes that Ratified Corporate Charters Pursuant to Section 17 of the Indian Reorganization Act Thereby Waived Their Immunity from Legal Suits Arising from Tribal Actions of Any Nature, Both Corporate and Governmental, Is a Federal Question of Supreme Importance to All Indian Tribes and Never Has Been Considered by this Court.

To remedy the ill effects caused by its earlier assimilationist and allotment legislation, Congress in 1934 passed the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1970); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973), a statute perhaps unequalled in importance to the Indian people, *see* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 84, 123 n. 7 (U. N. Mex. 1971). The overriding purpose of the IRA is to revitalize tribal government and to rehabilitate the Indian's economic life. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 152 (1973). The essence of the Act is in sections 16 and 17. Krieger, *Principles of the Indian Law and the Act of June 18, 1934*, 3 GEO. WASH. L. REV. 279, 298 (1935); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 965 (1972). Section 16 provides that a tribe could organize a government for the common welfare by adopting a constitution and by-laws. 25 U.S.C. § 476 (1970). Section 17 provides that a tribe could incorporate by vote of the adults on the reservation. 25 U.S.C. § 477 (1970). A tribe that has organized under section 16 need not incorporate.

Sections 16 and 17 provide for two separate mechanisms to establish two distinct organizations to accomplish two different goals. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 330 (U. N. Mex. 1971). This distinction has been enunciated consistently and forcefully by the Department of the Interior, the agency empowered to implement the IRA. The Department has held specifically that an Indian tribe organized pursuant to section 16 of the IRA is not the "same legal entity" as a corporation chartered on behalf of the newly organized tribe pursuant to section 17 of the Act. Memo. Sol. I.D., M-36515, 65 DEC. DEP. OF INT. 483 (1958). Relying upon an earlier decision, Memo. Sol. I.D., M-36119, 61 DEC. DEP. OF INT. 8 (1952), and on a study of the legislative background of the Act, the Department stated:

> The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations materially differ.

65 DEC. DEP. OF INT. at 484. *See also* Memo. Sol. I.D., M-36545, Dec. 16, 1958 (unpublished); Memo. Sol. I.D., 57 DEC. DEP. OF INT. 145 (1940); Memo. Sol. I.D., March 25, 1939 (unpublished); Memo. Sol. I.D., Dec. 11, 1937 (unpublished). Accordingly, the Department of the Interior has held that powers conveyed to a tribal corporation in its charter have no operation with regard to actions of the tribe taken in its governmental capacity, unless those powers explicitly have been incorporated into the tribal constitution by reference. Memo. Sol. I.D., M-36545, Dec. 16, 1958 (unpublished).

The Montana Supreme Court disregarded the legislative scheme by holding that "a sue and be sued" provision, adopted only by the corporate organization, is to be applied to actions taken by the governmental organization. It was the first court to so hold.[2] Section 17 authorizes these charters to convey only those powers that "may be *incidental to the conduct of corporate business. . . .*" 25 U.S.C. § 477 (1970) (emphasis added). Section 5 of the Fort Belknap Indian

[2] There have been only two other decisions interpreting the "sue and be sued" provisions in tribal corporate charters. In *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966), the court held that the "sue and be sued" provision did not waive the tribe's traditional immunity from suit in a garnishment proceeding to subject property of the tribal corporation for the purpose of satisfying a judgment obtained against the corporation. In *Martinez v. Southern Ute Tribe*, 374 P.2d 691 (Colo. 1962), the court held that the "sue and be sued" provision waived the tribe's immunity from suit against the corporation for allegedly denying plaintiff membership, and the benefits of membership, in the corporation. Both of these decisions involved suits against the tribal corporation for actions taken by the tribe in its corporate capacity.

Community's charter provides in boilerplate fashion that only "corporate powers" were conveyed. Surely, a "corporate power" to "sue and be sued" was not intended to reach an alleged tort committed in connection with an arrest by a tribal police officer, a purely governmental action. Indeed, if this charter provision was intended to stretch so far, it certainly would be void, because the Act does not authorize the conveyance of such powers that wholly are irrelevant to the conduct of tribal business.

If this Montana decision is allowed to stand, the very existence of the 88 incorporated tribes and the 67 incorporated native villages will be threatened.[3] None of these charters can be revoked or surrendered without an act of Congress. 25 U.S.C. § 477 (1970). By their participation in a legislative and administrative program designed to strengthen tribal economic development, and, thus, their existence as a cohesive and functioning entity, the Montana Supreme Court seeks to undermine that very existence. This the plain language of section 17, its legislative background, and the decisions by the Department of the Interior, and section 5 of the charter itself, plainly disallow.

[3] The "sue and be sued" provision, subject to the judgment, lien, or attachment proviso, is included in all 88 charters ratified by Indian tribes under section 17 of the IRA. (This figure was compiled by Counsel for Amicus Curiae after review of all tribal corporate charters on file at the Department of the Interior, Bureau of Indian Affairs, Branch of Tribal Relations, in Washington, D. C., Nov. 23-24, 1976.) The "sue and be sued" provision, with no proviso, is included in all 67 charters ratified by Alaskan native villages. (*Id.* Section 17 of the IRA, 25 U.S.C. § 477 (1970), was applied to the then territory of Alaska by statute in 1936. 25 U.S.C. § 473a (1970).)

II. The Montana Supreme Court's expansive interpretation of the "Sue and Be Sued" Charter Provision Conflicts in Principle With the Decisions of This Court and of the Lower Courts Establishing the Doctrines of Indian Tribal Immunity and Governmental Immunity.

Each Indian tribe begins its relationship with the federal government as a sovereign, with powers subject to qualification only by treaties and by express congressional legislation; what is not expressly limited remains within the domain of tribal sovereignty. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559-61 (1832); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (U. N. Mex. 1971). *See also United States v. Mazurie,* 419 U.S. 544, 556-57 (1975). It is because of this sovereignty that this Court long has recognized that an Indian tribe is immune from suit without consent. *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Turner v. United States,* 248 U.S. 354, 358 (1919). Such consent must by explicit, *Dicke v. Cheyenne-Arapaho Tribes, Inc.,* 304 F.2d 113, 114 (10th Cir. 1962),[4] and cannot be given by officials, *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 513 (1940).

These principles have been ignored by the Montana Supreme Court in the instant case. There is no consent given, explicit or otherwise, to suits arising out of the noncorporate actions of the Fort Belknap Indian Community. This Court has stressed that the question whether a sovereign has consented to suit primarily is one of intent. *E.g., Edelman v. Jordan,* 415 U.S. 651, 672 (1974). Nothing in the legislation or its

[4] The *Dicke* ruling is consistent with the decisions by this Court holding that a waiver of sovereign immunity by the United States, *United States v. Shaw,* 309 U.S. 495, 500-01 (1940), or by a state, *Edelman v. Jordan,* 415 U.S. 651, 673 (1974), must be express.

history indicates that the inclusion of a "sue and be sued" provision in the tribal charters was intended to apply to actions taken outside a tribe's corporate capacity. In fact, at the very time these charters were being developed, it was the position of the Department of the Interior, as reflected in its decisions and in the charters themselves, that the powers given the tribal corporation could not be exercised by the tribal government organized under section 16. This Court has recognized that the "dramatic" difference between an entity's proprietary functions and its governmental functions is important in deciding whether there has been an intent to waive sovereign immunity. *Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare,* 411 U.S. 279, 284-85 (1973). It is decisive in this case.

In *Fidelity & Guaranty,* this Court noted that the same public policy that exempts the "dominant" sovereign from suit, exempts the "dependent" sovereign. 309 U.S. at 512. This public policy includes the protection of the sovereign's financial coffers. *See Cohens v. Virginia,* 19 U.S. 120, 182, 6 Wheat. 264, 406-07 (1821). This policy applies with special force to Indian communities. Indian tribal governments simply cannot afford the liability to which the Montana Supreme Court has exposed them.

It also would undo the financial progress made by the tribes since, and as a result of, the IRA. It is the policy of Congress to strengthen further tribal governments and tribal economic development. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (Supp. V 1975). The resultant vitality, which Congress encouraged by enacting the IRA and the Self-Determination Act, is threat-

ened grievously by the Montana Supreme Court decision.

It is for the precise reason of protecting the tribes' financial existence that the doctrine of tribal immunity from suit remains a part of the law. This Court, and lower courts following that lead, has enunciated principles that ensure the protection of the tribes' sovereignty from state encroachment. In the instant case, the Montana Supreme Court has disregarded these principles to the severe detriment of the 88 incorporated tribes and the 67 incorporated native villages in this country, of all Indian people, and of everyone whose interest it is to retain a thriving indigenous people in the United States.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the Montana Supreme Court in this case should be granted.

Respectfully submitted,

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Congress of American Indians, Inc., respectfully moves this Court for leave to file the accompanying brief, as *amicus curiae,* in support of the petition for writ of certiorari filed by the Fort Belknap Indian Community.

In support of this motion, your *amicus* has stated its interest in this case in the accompanying brief. The written consent of the petitioner to presenting this brief is filed simultaneously with it. The respondents have not acted on a request for their consent.

Your *amicus* believes that its views will assist the Court in its consideration of the petition.

Respectfully submitted,

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Respondents.

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Congress of American Indians, Inc. (NCAI), is one of the oldest and most representative organizations for the promotion, preservation and protection of the interests of native Americans. A non-profit association, formed in 1944 and incorporated in 1954 in Oklahoma, NCAI's membership consists of over 120 tribes, most which are organized pursuant to

the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461 *et seq.*, and some 1,500 individual Indians. NCAI is convinced that, unless the decision below is reversed, IRA tribes will be subjected to endless civil suits for damages or other relief that will surely drain tribal treasuries and reduce to a nullity the federal policy of tribal self-determination.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Montana has created needless confusion and reached an erroneous result on an important question of the state's judicial power over an Indian tribe.[1] This time the question is not only one of jurisdiction [2] but also one of tribal sovereign immunity. Here the Court is faced with clear misreading of the language and legislative history of §§ 16 and 17 of the Indian Reorganization Act, 25 U.S.C. §§ 476 and 477, that has led the lower courts to see a waiver of

[1] The court below has been reversed by this Court twice in cases involving unauthorized state court authority over reservation Indians and tribes. *Fisher* v. *District Court,* 424 U.S. 382 (1976), and *Kennerly* v. *District Court,* 400 U.S. 423 (1971). Both reversals came through this Court's summary action on the petitions for certiorari, without further briefing or argument. The lower court has followed this Court's mandate against such improper state intrusion in Indian affairs on other occasions since *Kennerly. Security State Bank* v. *Pierre,* 162 Mont. 298, 511 P.2d 325 (1973); *Blackwolf* v. *District Court,* 158 Mont. 523, 493 P.2d 1293 (1972); and *Crow Tribe* v. *Deernose,* 158 Mont. 25, 487 P.2d 1133 (1971). But in this case and *Little Horn State Bank* v. *Stops,* 555 P.2d 211 (Mont. 1976), *certiorari pending,* No. 76-931 (U.S., filed Jan. 5, 1977), the lower court has again regressed.

[2] Petitioner tribe has never consented to, nor has the State of Montana sought to assume, jurisdiction over the Fort Belknap Reservation pursuant to 28 U.S.C. § 1360 or 25 U.S.C. § 1322(a). *See Kennerly* v. *District Court, supra* note 1.

immunity where there is none.[3] The misreading has improperly melded the petitioner's tribal governing body, created pursuant to § 16 of the Act, with its tribal corporation, organized pursuant to § 17. The lower courts have recognized only one tribal entity when Congress clearly intended two.

The tribe has both a governmental organization and a corporate organization. The governing body, reorganized by § 16 of the IRA, has retained the sovereignty which resided in the aboriginal tribes that now comprise the Fort Belknap Indian Community. Such tribal sovereigns have always been clothed with immunity from suit. *United States* v. *United States Fidelity & Guar. Co.,* 309 U.S. 506, 512 (1940), and *Turner* v. *United States,* 248 U.S. 354, 358 (1919). It is an immunity like that protecting from suit without their consent both the United States, *Monaco* v. *Mississippi,* 292 U.S. 313 (1934), and the several States, *Edelman* v. *Jordan,* 415 U.S. 651 (1974). In the case of tribal immunity, any waiver must come from Congress. *United States* v. *United States Fidelity & Guar. Co., supra,* and *Turner* v. *United States, supra.* A tribe alone cannot consent. *See Kennerly* v. *District Court,* 400 U.S. 423 (1971). The waiver must be express, as must any congressional action affecting the status of tribes with respect to state authority. *See McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 171 (1973).

[3] The misreading is implicit, even though the Montana Supreme Court here did not express its reasons for denying the Fort Belknap Community's writ to reverse and set aside the district court's order to dismiss the case. 554 P.2d at 1115 (Appendix to the Petition (App.) 1a).

In the IRA, Congress gave tribes an opportunity to reorganize into two different entities, recognizing the governing aspect of tribal authority over their lands and people and the proprietary aspect of tribal ownership of their lands and resources. Section 16 plainly speaks to the governing organization and § 17 plainly addresses the proprietary corporation. Just as the statute itself discriminates between the two concepts in separate sections, the legislative history distinguishes the purposes of creating two entities. The House Committee on Indian Affairs reported that the bill leading to the Act granted

> ". . . Indians living under Federal tutelage the freedom to organize for purposes of *local self-government* and *economic enterprise* . . . ." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 1 (1934). (Emphasis added.)

Similarly the Senate Committee stated the dual organizational purposes

> "(3) To stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations.
>
> "(4) To permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934).

The Solicitor of the Department of the Interior, the primary administrative agency for all federally recognized tribes, has twice held that the government and the corporation of each IRA tribe are distinct bodies with different powers and responsibilities. 65 I.D. 483, 484 (1958) and 61 I.D. 8 (1952).

Suit against an IRA tribal governing body is simply not authorized by the IRA. Yet it is that statute upon which the plaintiff below has exclusively relied in asserting a waiver of the Tribe's immunity. Plaintiff here sued the Tribe, not the tribal corporation. But the *Tribe* is immune for lack of a congressional waiver, and the tribal corporation, though it may be sued, [4] has no authority over the tribal police officer involved here. The facts of the case, involving allegations of excessive force against the plaintiff by a tribal police officer in the course of arrest and custody of the former for his supposed violation of traffic laws, are obviously totally within the governmental sphere and have no possible connection with any corporate, business or economic enterprise of the tribe.

Equally without question is the fact that, since enactment of the IRA, Congress, particularly in the past few years, has continued to strengthen tribal government through increased governmental and business programs, such as the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*

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[4] No express waiver of immunity can be found with respect to either the tribal government or the tribal corporation in § 16 or § 17 of the Act, respectively. There is language in the petitioner's corporate charter purportedly authorizing the tribal corporation "to sue and be sued". This charter language was approved by the Secretary of the Interior and therefore reflects his decision that waiver of immunity was authorized by Congress with respect to the corporation. Whether or not Congress in the IRA has authorized the corporation's waiver has not been directly raised in this petition, and resolution of that issue must await another case where, unlike here, the corporate powers and not the governmental powers, are the subject of the suit.

Congress has not in any of those Acts expressly waived the immunity that bars the present case.[5] Furthermore, it is implicit from the policies of those acts that Congress would not have carelessly exposed tribal government treasuries to the repetition of costly suits for damages for acts of those sovereigns in their governing capacities.

CONCLUSION

For the foregoing reasons, your *amicus* prays that the Court agree to review this case by granting the petition for writ of certiorari.

Respectfully submitted,

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January, 1977

[5] Whether or not a waiver of immunity may have been intended by the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, is not addressed here for the failure of the plaintiff below to rely on its provisions. In any event, the rights that Act created under federal law would not be adjudicated in a state court.

Supreme Court, U. S.
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No. 76-919

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FORT BELKNAP INDIAN COMMUNITY OF THE FORT BELKNAP INDIAN RESERVATION, MONTANA, PETITIONER

v.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, ETC. ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of March 21, 1977, inviting the Solicitor General to express the views of the United States.

STATEMENT

The membership of the Fort Belknap Indian Community, comprising those portions of the Gros Ventre and Assiniboine Indian Tribes living on the Fort Belknap Reservation, is organized under a federally-approved 1935 constitution and is incorporated under a federally-issued 1937 charter. These instruments were approved and issued by the Secretary of the Interior pursuant to Sections 16 and

17, respectively, of the Indian Reorganization Act of 1934, 48 Stat. 987, 988, as amended, 25 U.S.C. 476, 477.[1]

James W. Gardipee in an affidavit filed in this Court on January 22, 1977, states that his wife and five children "are enrolled members of" petitioner, although he himself is "an enrolled member of the Turtle Mountain Indian Reservation, Aberdeen, North Dakota." On September 18, 1975, Gardipee commenced a common-law tort action (No. 7301) in the respondent state district court naming petitioner as the sole defendant. According to Gardipee's amended complaint (Pet. App. 3a-5a), Leon Martinez, petitioner's chief of police, "claims to have arrested" Gardipee in October 1974 for driving "on the Fort Belknap Indian Reservation without a valid Montana vehicle operator's license." The amended complaint further alleges that Police Chief Martinez took Gardipee in a police car to a place on U.S. Highway No. 2 about one mile west of Harlem, Montana, where Gardipee requested permission to leave the police car. The amended complaint alleges that Martinez stopped the car and, after Gardipee got out, shot him in the left leg. The respondent state district court later noted that these alleged acts occurred "outside the exterior boundaries of the Fort Belknap Indian Reservation" (Pet. App. 2a).[2]

In his amended complaint Gardipee sought $80,000 from petitioner as general and special damages on separate

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[1]The petition sets out the foregoing statutes (Pet. 2-3) as well as the 1937 corporate charter (Pet. App. 5a-13a). Both the 1937 charter and the 1935 constitution are briefly discussed in *Colliflower* v. *Garland*, 342 F. 2d 369, 373 (C.A. 9).

[2]In this Court petitioner states (Pet. 7) that Police Chief Martinez arrested Gardipee and claims that Martinez was transporting Gardipee to Blaine County jail in Chinook, Montana, pursuant to "a working agreement" under which Blaine County received and incarcerated persons arrested by petitioner's police officers.

claims for assault and battery and for negligence arising out of Martinez' alleged conduct. Martinez was not named as a defendant.

Petitioner moved to dismiss Gardipee's action on the ground that it was immune from state-court suits unless that immunity was expressly waived. On February 24, 1976, the respondent state district court (Pet. App. 2a), through the respondent state judge, denied the motion, noting that the alleged conduct occurred off the reservation, and that petitioner, in Section 5(i) of its 1937 corporate charter (Pet. App. 9a), "has waived" whatever immunity it might have. Gardipee's action remains pending in the respondent state court.

On May 11, 1976, petitioner commenced a separate, original action (No. 13374) in the Supreme Court of Montana against the respondent state district court and judge, in which petitioner sought a writ of supervisory control or other appropriate writ ordering the respondents to dismiss Gardipee's tort action for lack of jurisdiction. On May 18, 1976, the Supreme Court of Montana, after "hearing the matter ex parte," denied the requested relief stating that "there are relevant factual disputes that cannot be resolved by this Court and thus supervisory control is not proper" (Br. Opp. App. 11a;[3] Pet. 7-8). The denial was "without prejudice," and petitioner commenced a second proceeding (No. 13443) in the Supreme Court of Montana on July 8, 1976, seeking the same relief (Pet. 8). On October 7, 1976, the Supreme Court of Montana, after having heard counsel "in ex parte presentation"

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[3]The respondents' typewritten brief in opposition to the petition for certiorari contains an appendix lacking numbered pages. We have treated the page immediately following numbered page 6 of the brief in opposition as page 1a with consecutive numbering thereafter.

(Pet. App. 1a), again denied the requested relief without explanation. *State ex rel. Fort Belknap, etc.* v. *Dist. Court, etc.*, 554 P.2d 1115 (Mont. Sup. Ct.) It is this order of October 7, 1976, which the petitioner seeks to have reviewed by this Court.

Meanwhile, on September 28, 1976, the respondent state district court issued its order entering a default judgment against petitioner (Br. Opp. App. 18a) "for such sum as shall be determined and found as damages in proceedings before this Court and jury to be held on a date to be fixed by this Court."[4] Notice of entry of default (Br. Opp. App. 19a) was issued by the respondent state court on October 19, 1976. On or about November 8, 1976, petitioner tendered its answer (Br. Opp. App. 20a-21a) to the respondent state district court, which consisted of a general denial and a statement that petitioner "makes this answer * * * as a special appearance and only for the purpose of excepting to the jurisdiction of" the respondent state district court. On or about January 12, 1977, petitioner filed in the respondent state district court a motion to set aside the default judgment (Br. Opp. App. 22a-24a).

DISCUSSION

The United States believes the petition for a writ of certiorari should not be granted at this time. The decision of the Supreme Court of Montana (Pet. App. 1a), rendered without opinion, did not expressly or necessarily determine any federal question but simply denied petitioner an extraordinary remedy in an original proceeding before that court.[5] It appears that adequate and independent grounds

[4]Petitioner did not respond to a notice of application for default judgment filed by Gardipee.

[5]By contrast, the Montana Supreme Court did decide questions of federal law in *State ex rel. Adoption of Firecrow* v. *District Court*, 536 P.2d 190, reversed *sub nom. Fisher* v. *District Court*, 424 U.S. 382, and in *State ex rel. Kennerly* v. *District Court*, 154 Mont. 488, 466 P.2d 85, reversed *sub nom. Kennerly* v. *District Court of Montana*, 400 U.S. 423.

exist in state procedural law for denying petitioner such extraordinary relief. *State ex rel. Kosena* v. *District Court, etc.*, 560 P.2d 522 (Mont. Sup. Ct.). Because this Court has power to correct only those state-court judgments which "incorrectly adjudge federal rights" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126;[6] see also *Hammerstein* v. *Superior Court*, 341 U.S. 491; compare *Richardson* v. *Ramirez*, 418 U.S. 24, 40-42 n. 13, 59-63, and *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 233-234, 242-247), further review is precluded at this time.

Under Montana law the Montana Supreme Court retains full discretion over whether to grant or deny a writ of supervisory control.[7] Mont. Const., Art. VII, sec. 2(1), (2) (Cum. Supp. 1975); Rule 17, Mont. R. App. Civ. P. "[The writ] is available only in original proceedings * * *, and although it may issue in a broad range of circumstances, it is not equivalent to an appeal." *Fisher* v. *District Court*, 424 U.S. 382, 385 n. 7, reversing *State ex rel. Adoption of Firecrow* v. *District Court*, 536 P.2d 190 (Mont. Sup. Ct.). The Montana Supreme Court has recently stated that summary relief

[6]In *Herb* v. *Pitcairn, supra*, the Court stated (324 U.S. at 126):

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[7]Rule 17(a), Mont. R. App. Civ. P., states in part:

> The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

requires "extraordinary and compelling circumstances beyond simply requiring a party to proceed to trial." *State ex rel. Kosena* v. *District Court, etc., supra,* 560 P.2d at 422.

The order of the Montana Supreme Court does not specify the basis for its refusal to issue the writ. While it may have believed that the district court had correctly rejected petitioner's sovereign immunity defense, it may simply have found "no extraordinary and compelling circumstances" to justify accelerating the normal appellate review.[8] The court may also have believed that the sovereign immunity question could better be decided on a fuller factual record, showing, for example, whether the petitioner employed Martinez as part of its corporate functions under the 1937 charter or as part of its governmental functions under the 1935 tribal constitution.[9] "Where the highest court of the state renders no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment" (*Stembridge* v. *Georgia,* 343 U.S. 541, 547 (emphasis in original)).

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[8]An appeal of any future judgment in the respondent state district court can be taken to the Supreme Court of Montana. Rules 1, 4-5, Mont. R. App. Civ. P. That appeal will provide an opportunity to correct any erroneous assertion of state-court jurisdiction over Indians or Indian organizations. *Crow Tribe of Indians* v. *Deernose,* 158 Mont. 25, 487 P.2d 1133; cf. *Hammerstein* v. *Superior Court, supra,* 341 U.S. at 492-493.

[9]While contending that the 1937 corporate charter does not terminate the Tribe's immunity from suit in all instances, petitioner suggests (Pet. 12-15) that it may be sued in connection with its corporate activities. See also *Separability of Tribal Organizations,* 65 I.D. 483. The United States agrees with petitioner that adoption of a corporate charter is not a general waiver of sovereign immunity and believes that the issue may be of sufficient general importance to warrant this Court's attention on a suitable record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.